Supreme Court, U.S.
FILED

(1)

No. 011074 JAN - 2 2002

In the
Supreme Court of the United States

OFFICE OF THE CLERK

GREGORY C. GILMORE

Petitioner,

v.

GENERAL ELECTRIC COMPANY;
GE POWER SYSTEMS

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael P. Harvey
Counsel of Record
c/o Michael P. Harvey Co., L.P.A.
311 Northcliff Drive
Rocky River, Ohio 44116
(440) 356-9108
Attorney for Petitioner

60 pp

QUESTIONS PRESENTED

1. Is it necessary for a disabled employee to request an Americans with Disabilities Act reasonable accommodation in a certain fashion to be effective?

2. If a disabled employee refuses an unreasonable accommodation, does he lose his statutory protection under the Americans with Disabilities Act?

3. Is summary judgment appropriate in any case based solely upon a conclusory, hearsay affidavit?

PARTIES TO THE PROCEEDING

The only parties are named in the caption of this Petition. The parties are:

Petitioner: Gregory C. Gilmore ("Mr. Gilmore"), an individual.

Respondent: Petitioner states that GE Power Systems ("GE") (a.k.a. "Rueter Stokes"), is a wholly-owned subsidiary of General Electric Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND ADMINISTRATION PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. NATURE OF THE CASES 3

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW 3

C. STATEMENT OF FACTS 3

1. FOR 13 YEARS PRIOR TO HIS DEPRESSION MR. GILMORE'S WORK WAS EXCELLENT 3

2. GE'S AWARENESS OF MR. GILMORE'S DEPRESSION 4

3. MR. GILMORE TOLD GE OF HIS DEPRESSION 4

4. GE HUMAN RESOURCES FAILED TO RESPOND 5

5. GE'S REFUSAL TO PROVIDE REASONABLE ACCOMMODATIONS 5

6. GE'S SUMMARY JUDGMENT AFFIDAVIT IS DEFECTIVE 5

7. GE FAILED TO FOLLOW ANY OF ITS OWN PROCEDURES 6

8. LIFE AND WORK ACTIVITIES AFFECTED BY MR. GILMORE'S DEPRESSION 6

REASONS FOR GRANTING THE WRIT 7

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY REASONABLE ACCOMMODATIONS OBLIGATIONS UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT 7

A. BECAUSE THE LOWER COURTS MISCHARACTERIZED MR. GILMORE'S REQUESTED ACCOMMODATIONS AS FAILING TO MEET SOME UNIDENTIFIED THRESHOLD, PETITIONER REQUESTS A WRIT OF CERTIORARI 7

B. THE CIRCUIT COURTS OF APPEALS ARE SPLIT ON WHETHER THE INTERACTIVE APPROACH REQUIRED BY THE EEOC REGULATIONS MUST BE USED UNDER ADA TITLE I 9

C. BECAUSE GE FAILED TO ENGAGE IN ANY UNDUE HARDSHIP ANALYSIS -- PETITIONER IS ENTITLED TO A WRIT OF CERTIORARI 13

II. THIS COURT SHOULD ALSO GRANT CERTIORARI TO PROVIDE GUIDELINES TO EMPLOYERS AND EMPLOYEES ALIKE ON WHEN AN UNREASONABLE OFFER CAN BE REFUSED WITHOUT JEOPARDIZING THE STATUTORY PROTECTIONS GUARANTEED UNDER THE AMERICANS WITH DISABILITIES ACT 14

I. THIS COURT IS REQUESTED TO REAFFIRM THAT SUMMARY JUDGMENT IS INAPPROPRIATE IN ANY CASE IF BASED UPON A CONCLUSORY, HEARSAY AFFIDAVIT 17

1. THE DISTRICT COURT, AFTER DISCUSSING A PROPER SUMMARY JUDGMENT STANDARD, IGNORED IT IN THIS CASE 18

2. A CONCLUSORY, HEARSAY AFFIDAVIT IS IMPROPER EVIDENCE UPON WHICH TO CIRCUMVENT THE CONSTITUTIONAL RIGHT TO JURY TRIAL 19

3. AN AFFIANT MUST BE COMPETENT AND KNOWLEDGEABLE AS TO THE MATTERS IN HIS AFFIDAVIT 19

4. DIRECT EVIDENCE OF DISCRIMINATION IS NOT REQUIRED BY THIS COURT AT ANY STAGE. .. 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994) 18
Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999) 18
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18
Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) 19
Archer v. Mesaba Aviation, Inc., 200 U.S. App. 18
Lexis 6420 (6th Cir. April 3, 2000) 18
Baert v. Euclid Beverage Ltd., 149 F.3d 626 (7th Cir. 1998) 10
Barnett v. U.S. Air, Inc. 228 F.3d 1105 (9th Cir. 2001) 9, 14, 15
Beck v. University of Wisconsin Board of Regents,
75 F.3d 1130 (7th Cir. 1996) 10, 13
Bragdon v. Abbott, 118 S.Ct. 2196 (1998) 8
Brickers v. Cleveland Board of Education
145 F.3d 846 (6th Cir. 1998) 11
Brown v. Chase Brass & Copper Co.
2001 U.S. App. Lexis 15726 (6th Cir. July 10, 2001) 12
Bultemeyer v. Ft. Wayne Community Schools,
100 F.3d 1281 (7th Cir. 1996) 10
Burns v. Coca Cola Enterprises, 222 F.3d 247 (6th Cir. 2000) 11
Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998) 12
Celotex Corp. v. Catrett, 477 U.S. 317 (1996) 18
Chapman v. AI Transport, 180 F.3d 1244 (11th Cir. 1999) 22
Chappell v. GTE Products Corp., 803 F.2d 261 (6th Cir. 1996) 20
Connolly, III v. Entex Information Services, Inc.,
2001 U.S. App. Lexis 26802 (9th Cir. May 10, 2001) 15
Daily Press, Inc. v. United Press International,
412 F.2d 126 (6th Cir.), *cert denied*, 396 U.S. 990 (1969) 20
Deane v. Pocono Med. Ctr., (3rd. Cir. 1998) 142 F.3d 138, 149 16
EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) 9
EEOC v. G-K-G, Inc., 39 F.3d 740 (7th Cir. 1994) 17
EEOC v. Yenkin-Magistec Paint Corp.,
112 F.3d 831 (6th Cir. 1997) 22

Felts v. Optima Health, Inc. 251 F.3d 21 (1st Cir. 2001) 11
Fjellestad v. Pizza Hut of Amer., Inc. 188 F.3d 944 (8th Cir. 1999) ... 10
Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) 23
Gantt v. Wilson Sporting Goods Co. 143 F.3d 1042 (6th Cir. 1998) ... 12
Garcia-Ayala v. Lederle Parenterals, Inc.,
212 F.3d 638 (1st Cir. 2000) 11
General Elec. Co. v. Joiner, 118 S. Ct. 512 (1997) 17
Grenier v. Syanamid Plastics, Inc., 70 F.3d 667 (1st Cir. 1995) 13
Haglof v. Northwest Rehab., Inc., 910 F.2d 492 (8th Cir. 1990) 17
Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir 1999) 11
Hinson v. Tecumeh Products Co., 2000 .....
U.S. App. Lexis 26778 (6th Cir. October 17, 2000) 12
Humphrey v. Memorial Hospital Assoc.,
239 F.3d 1128 (9th Cir. 2001) 9
Ivette Soto-Oscasio v. Federal Express Corporation,
150 F.3d 14 (1998) 11
Jacques v. Clean-Up Group, Inc. 96 F.3d 506 (1st Cir. 1996) 11
Kendall v. Hoover Co., 751 F.2d 171 (6th Cir. 1994) 19
Kline v. Tenn. Valley Authority, 128 F.3d 337 (6th Cir. 1997) 22
Lasher v. Ford Motor Co., 785 F.2d 309 (6th Cir. 1996) 19
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 17
Mengine v. Runyon, 114 F.3d 415 (3rd Cir. 1997) 16
Miller v. Citizens Security Group, Inc.,
116 F.3d 343 (8th Cir. 1997) 19
Mitchell v. Toledo Hosp., 964, F.2d 577 (6th Cir. 1992) 20
Monette v. Electronic Data Systems Corp.,
90 F.3d 1173 (6th Cir. 1996) 12, 14
Montgomery v. Alcoa, Inc., 2001 U.S. App. Lexis 8096
(6th Cir. April 27, 2001) 12
Orthopedic & Sports Injury Clinic v. Wayne Laboratories, Inc.,
922 F.2d 220 (5th Cir. 1991) 19
Reeves v. Sanderson Plumbing, 503 U.S. 133 (2000) 23
Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994). 9

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414 (6th Cir. 1999) 22
Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) 10
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 23
Street v. J.C. Bradford & Co, 886 F.2d 1472 (6th Cir. 1999) 19
Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999) .. 10
Taylor v. Principal Financial Group, Inc., 93 F.3d 155 (5th Cir. 1996) 10
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1991) .. 23
Visser v. Packer Engineering, 924 F.2d 655 (7th Cir. 1991) 17
Ward v. Mass. Health Research Institute, Inc., 209 F.3d 29 (1st Cir. 2000) 11

FEDERAL STATUTES

28 U.S.C. § 1254 2
28 U.S.C. § 1291 2
42 U.S.C. § 1211(9) 7
42 U.S.C. §12101 2
42 U.S.C. § 12101(a)(2) 8
42 U.S.C. §§ 12101-12213 2
42 U.S.C. § 12111(10) 13
42 U.S.C. § 12111(10)(A) 13
42 U.S.C. § 12112(b)(5)(A) 8, 13, 14
42 U.S.C. § 12116 8
42 U.S.C. § 12117(a) 8

FEDERAL ADMINISTRATION REGULATIONS

29 C.F.R. pt. §1630; App. § 1630.2(o) 8
29 C.F.R. pt. 1630, App. § 1630.9 8
29 C.F.R. §1630.2(o)(iii)(3) 12
29 C.F.R. § 1630.9 13

FEDERAL CIVIL RULES

Fed. R. Civ. P. 56(e) 20

OTHER AUTHORITIES

Wright, Miller, Kane, 10A *Federal Practice & Procedure* 20

APPENDICES

October 1, 2001 Decision of the United States Court of Appeals for the Sixth Circuit 25

February 22, 2000 Memorandum, Opinion and Order of the United States District Court, Northern District of Ohio (Eastern Division) 28

BEST AVAILABLE COPY

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY C. GILMORE

Petitioner,

v.

GENERAL ELECTRIC COMPANY;
GE POWER SYSTEMS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY C. GILMORE, Petitioner, by the undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This is a dispute over whether Mr. Gilmore was terminated by GE in violation of his rights under Title I of the Americans with Disabilities Act ("ADA").

The October 1, 2001 Opinion of the Sixth Circuit Court of Appeals, which judgment is sought to be reviewed, is printed in Appendix A to this Petition. The Circuit Court affirmed Summary judgment, notwithstanding Mr. Gilmore's *prima facie* case. The Court found that Mr. Gilmore had not requested a reasonable accommodation because he "[d]id not inform his employer that he was seeking changes *because of* his disability." The Circuit Court also

found that Mr. Gilmore refused a medical leave "[w]ithout further discussion with his supervisor."

The decision of the United States District Court for the Northern District of Ohio (Eastern Division) that was reviewed by the Sixth Circuit Court of Appeals is reprinted in Appendix B to this Petition. The District Court granted Summary judgment to GE, although it determined that Mr. Gilmore made out a *prima facie* case of discrimination under the ADA. But, the Court concluded that the company offered a non-discriminatory reason for its actions, and Mr. Gilmore failed to demonstrate pretext, based solely upon the affidavit of GE's President.

JURISDICTION

The Judgment sought to be reviewed was entered by the Sixth Circuit of Appeals on October 1, 2001. This Judgment is set forth in Appendix A. Jurisdiction for the Sixth Circuit and district court was invoked through the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 and 28 U.S.C. § 1291. This Court has jurisdiction to review the Judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY AND ADMINISTRATION PROVISIONS INVOLVED

a) Title I of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*

b) EEOC Regulations on ADA Title I, 29 C.F.R pt. 1630.

STATEMENT OF THE CASE

A. Nature of the Case

This action arises from GE's discriminatory harassment, retaliation, termination and failure to accommodate Gregory Gilmore, based upon his disability, after more than 13 years of exemplary service in violation of federal law.

B. Course of Proceedings And Disposition in The Courts Below

Mr. Gilmore filed an eight-count Complaint against GE on September 24, 1998 after receiving an EEOC right to sue letter. Following GE's failure to provide complete discovery to the Plaintiff, GE filed a Motion for Summary judgment. Mr. Gilmore opposed, asserting that **(1)** GE did not meet its Fed. Civ. R. 56 burden because it ignored the numerous material facts in dispute; **(2)** Mr. Gilmore established both the prima facie and pretext prongs of disability discrimination, retaliation, harassment and failure to accommodate; **(3)** GE ignored Mr. Gilmore's state claims; and **(4)** GE's only evidence in support of summary judgment, P.J. Marolda's Affidavit, failed to comply with Fed. Civ. R. 56. On March 22, 2000, the district court granted Defendant's Motion for Summary Judgment in a 23-page Memorandum, Opinion and Order. Appendix B. On March 22, 2000, Mr. Gilmore filed a timely Notice of Appeal to the Sixth Circuit which affirmed on October 1, 2001.

C. Statement of Facts:

1. For 13 Years Prior to His Depression Mr. Gilmore's Work Was Excellent.

Mr. Gilmore worked with great success at various GE facilities from 1984 until fired in 1998. All throughout his career at GE,

including his September 11, 1995 evaluation completed by the individuals he worked with in the field, he received performance ratings that "exceeded standards."

2. GE's Awareness of Mr. Gilmore's Depression.

Mr. Gilmore first started experiencing depression in late 1995, early 1996. He regularly treated with physicians, who, to this day, prescribe anti-depressant and other medications to control his illness. Several weeks prior to his April 11, 1996 evaluation, Ms. Embrescia, the supervisor who terminated him, asked him if he had "emotional" problems; Mr. Gilmore, embarrassed at first, told her no.

3. Mr. Gilmore Told GE's of His Depression.

One week after his April 11, 1996 evaluation, Mr. Gilmore told Ms. Embrescia that he suffered from depression. Embrescia became upset because he had initially denied having emotional problems. He explained that he was concerned about misconceptions people have about his illness. Embrescia told him that she "understood" depression and the side effects of the medications and that she knew of previous GE employees who had depression. She talked with him about repressed anger and how depression affects people sexually. Periodically, Embrescia would ask him if he was doing any better on his medications.

4. GE Human Resources Failed to Respond.

Ms. Embrescia admitted that Joseph Mooney, HR Manager, as well as the then President of GE-Reuter Stokes, P.J. Marolda, were aware of Mr. Gilmore's depression through her. Neither Marolda nor Mooney had any discussions with Mr. Gilmore about his depression. Mooney was supposed to meet with Mr. Gilmore to review his options; it never occurred over a seven month period.

5. GE's Refusal To Provide Reasonable Accommodations.

GE never attempted to accommodate Mr. Gilmore's depression. Every accommodation he requested was ignored. Mr. Gilmore asked (1) to be considered for another job inside of GE; (2) to be moved to a quieter space; (3) for additional training and technical support; (4) job coaching; (5) for more frequent feedback on his performance; (6) to come in later in the morning after late travel; and (7) to reduce his hours as a salaried employee to an eight-hour day rather than 12 or 16-hour days.

Ms. Embrescia mentioned a medical leave once to Mr. Gilmore on April 18, 1996, the day she was informed of his depression. No one from GE made any effort to determine any appropriate accommodations.[1]

6. GE's Summary Judgment Affidavit is Defective.

Mr. Marolda's Affidavit "supporting" GE's Motion for Summary Judgment states that ESSROC complained about Mr. Gilmore specifically during a meeting and asked that he be removed. Mr. Phelan and Mr. Elghoroury, who were at the ESSROC meeting (as opposed to Marolda), did not have this recollection. Phelan, who claimed to take notes that he had with him at his deposition, but would not produce[2], admitted that: (1) ESSROC did not ask that Mr. Gilmore not return to the site; (2) ESSROC did not ask that he be

---

[1]The Circuit Court mischaracterized GE's summary judgment evidence. There was no evidence GE offered a medical leave "so that he could regulate his medicines and become a more productive employee." App. A, p. 2. In fact, the supervisor only inquired whether Mr. Gilmore considered a medical leave. App. B, p. 5.

[2]GE counsel refused to produce the notes after Phelan stated he had them with him. They were supposed to be sent after counsel reviewed them -- it never occurred.

terminated; (3) Mr. Gilmore did go back to the site on a number of occasions after the meeting and before his termination; (4) the only concerns raised were when Mr. Gilmore arrived and left the site and his feedback; (5) he did not talk to Mr. Gilmore about these alleged problems at any time; and (6) he did not have any evidence to support the alleged complaint that came from some unidentified individual. Marolda was not at ESSROC and had no firsthand discussions with Gilmore or ESSROC. It was GE's sole evidence on summary judgment.

7. GE Failed To Follow Any of Its Own Procedures.

Mr. Gilmore was called on February 22, 1997 and told he was suspended without explanation. On February 25, 1997, he was asked to a meeting without explanation and was fired. He learned at this meeting that over the previous seven months Embrescia and others were compiling information on him to support the termination. Mr. Gilmore asked for an opportunity to explain. Marolda's response was, "I am not going to discuss that with you." GE's Positive Action Procedure was never applied to Mr. Gilmore. At least four steps should have preceded his termination, including a peer review process.

8. Life and Work Activities Affected By Mr. Gilmore's Depression.

Mr. Gilmore's depression caused difficulties with his communication, sleeping, concentration and decision making. He experienced shaking, forgetfulness and comprehension problems. He had a hard time speaking; was anxious and over-reacted to certain circumstances; and he and his wife were having marital problems as a result of the depression. The medication and counseling sessions were helping and continue to help to this day.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY REASONABLE ACCOMMODATIONS OBLIGATIONS UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT.

A. Because the Lower Courts Mischaracterized Mr. Gilmore's Requested Accommodations as Failing to Meet Some Unidentified Threshold, Petitioner Requests a Writ of Certiorari.

Both lower courts incorrectly determined that Mr. Gilmore did not request a reasonable accommodation. Yet, the Sixth Circuit noted that he did request "altered work schedules, a quieter work space, and other concessions, not available to similarly-situated employees." However, the Sixth Circuit discounted those requests by stating "nevertheless, in no instance did he inform his employer that he was seeking such changes *because of* his disability." Appendix A, p. 2. And, the district court incorrectly determined that "[m]ost of the evidence Plaintiff points to cannot be construed as a request for an accommodation." Appendix B, pp. 19-21.

Over a seven month period, Mr. Gilmore requested a reduction in his travel schedule; additional meetings with his supervisor to review his performance; another job inside of GE; a move to a quieter work space; additional training and technical support; job coaching; approval to come in late on mornings after he traveled late the night before; and an eight hour rather than twelve or more hour days as a salaried employee. All of his requests were ignored by GE.

Under the ADA, discrimination includes "not making reasonable accommodations to the known physical or mental

limitations of an otherwise qualified individual with a disability. . . ." 42 U.S.C. § 12112(b)(5)(A). The statute unequivocally establishes a cause of action for disabled employees whose employers fail to reasonably accommodate them.

Thus, in the employment context, the law requires an evaluation of an individual's ability to work with reasonable accommodations and an employer's ability to make those accommodations under the facts of the particular situation. The ADA was not designed to further isolate, ignore or out of ignorance mischaracterize people with disabilities. 42 U.S.C. § 12101(a)(2). Reasonable accommodation may include job restructuring, part-time and modified work schedules, reassignments to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies. . . and other similar accommodations. 42 U.S.C. § 1211(9); 29 C.F.R § 1630.2(o)(2)(ii).

The ADA authorizes the EEOC to issue regulations implementing the ADA. *See* 42 U.S.C. § 12116. The EEOC has stated that in order to determine an appropriate reasonable accommodation, "[i]t may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. pt. §1630; app. § 1630.2(o)(3). The EEOC views the interactive process as a mandatory obligation. *See* 29 C.F.R. pt. 1630, App. § 1630.9.

Title I regulations issued by the EEOC are entitled to judicial deference because the EEOC was directed by Congress to issue regulations implementing the statute. *See* 42 U.S.C. § 12116. Also, the EEOC was given responsibility by Congress to enforce the law with respect to private employers. *See* 42 U.S.C. § 12117(a). This Court in *Bragdon v. Abbott*, 118 S.Ct. 2196, 2209 (1998) found that Title III of the

ADA entitles the Department of Justice regulations to deference because Congress gave the Justice Department regulatory and enforcement responsibility for that Title. Conversely, this Court in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991) held that the EEOC's regulations did not enjoy deferance under Title VII because the EEOC lacked regulatory authority over Title VII.

The ADA and the EEOC Regulations make it clear that an interactive process of reaching reasonable accommodations must be used. While it is the employee's initial responsibility to request an accommodation in a non-obvious situation, and to notify the employer of a disability, it is thereafter a mutual responsibility to reach an appropriate accommodation. Plain English is sufficient and the words "reasonable accommodation" or "ADA" do not have to be used. *Schmidt v. Safeway, Inc.* 864 F. Supp. 991, 997 (D. Or. 1994) (accommodations required if the employer is aware of the need).

B. The Circuit Courts of Appeals are Split on Whether the Interactive Approach Required by the EEOC Regulations Must be Used under ADA Title I.

The First, Third, Fifth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeals have held it necessary for an employer to initiate a dialogue with an employee in order to determine an appropriate accommodation. The Ninth Circuit has a mandatory obligation in all cases. *See Humphrey v. Memorial Hospital Assoc.* 239 F.3d 1128, 1137 (9th Cir. 2001). *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) held that the interactive process is mandatory for the employer and triggered by notice of the employee's disability and a desire for an accommodation. *Id.* at 1111. Moreover, the Court held that if the company is aware of the existence of the employee's disability, the employer must assist in initiating the interactive process, including analyzing the particular job involved; consulting with the individual; consulting with others; and considering the preferences of the employee. *Id.*

The Ninth Circuit noted a number of Circuits that have held that an employer cannot prevail on summary judgment if there is any genuine dispute as to whether the employer engaged in the interactive process. See *Fjellestad v. Pizza Hut of Amer., Inc.* 188 F.3d 944, 953 (8th Cir. 1999) (summary judgment is typically precluded when there is a genuine dispute as to whether the employer engaged in good faith in the interactive process of seeking reasonable accommodations); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315-18 (3rd Cir. 1999) (where there is a genuine dispute about whether the employer acted in good faith, summary judgment will typically be precluded); *Baert v. Euclid Beverage Ltd.*, 149 F.3d 626, 633-34 (7th Cir. 1998) (refusing to grant an employer summary judgment because disputes of fact remained about which party caused the breakdown in the interactive process).

The Seventh Circuit in *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) held the ADA requires "good faith" and the party that obstructs or delays the interactive process is acting in bad faith. In the Eighth Circuit held that when the disabled individual requests an accommodation it becomes necessary to initiate the interactive process. Similarly, in *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) the Tenth Circuit held that the duty to engage in the interactive process is triggered once the employee conveys to the employer a desire to remain with the company despite his disability. Id. at 1172. Similarly, in *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3rd Cir. 1999) the Third Circuit held that the employer's duty to engage in the interactive process is triggered once the employer knows of the disability and the employee's desire for accommodation and that the employer must meet the employee half way by requesting additional information *quoting Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996). Also, the Fifth Circuit in *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) stated that it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process of determining one.

The First Circuit has held that there may be situations in which a failure to engage in the process of interactive discussions would constitute a failure to provide reasonable accommodations that amounts to a violation of the ADA. See *Felts v. Optima Health, Inc.* 251 F.3d 21, 27 (1st Cir. 2001); *Ward v. Mass. Health Research Institute, Inc.*, 209 F.3d 29, 33 note 4 (1st Cir. 2000); *Jacques v. Clean-Up Group, Inc.* 96 F.3d 506, 515 (1st Cir. 1996); *Garcia-Ayala v. Lederle Parenterals, Inc.* 212 F.3d 638, 648 (1st Cir. 2000) (granting judgment for employee where the company had rejected the request for an accommodation without further discussion, although not deciding the interactive process issue).

The First Circuit also noted in *Ivette Soto-Oscasio v. Federal Express*, 150 F.3d 14 (1st Cir. 1998) "indeed, we have held that 'there may be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodations that amounts to a violation of the ADA.' *Id.* at 18 citing *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir. 1996). The First Circuit noted "in doing so, we have cautioned that 'cases involving reasonable accommodation turn heavily on their facts and an appraisal of the reasonableness of the parties' behavior." *Id.* at 515.

The Sixth Circuit Court of Appeals, however, has substantively ignored the interactive process requirements, and in fact, has affirmed the termination of many litigations simply based on its perception that the employee did not properly request an ADA accommodation. For example, in *Hammon v. DHL Airways, Inc.*, 165 F.3d 441 (6th Cir 1999) the Sixth Circuit affirmed summary judgment for the employer. The Court found that the plaintiff offered no proof that he asked for an ADA accommodation. Id. at 450. In *Brickers v. Cleveland Board of Education* 145 F.3d 846 (6th Cir. 1998) the Court held that the Plaintiff had to first request an accommodation for which she was qualified. Id. at 850. There was no discussion of an interactive process. In *Burns v. Coca Cola Enterprises*, 222 F.3d 247, 257 (6th Cir. 2000) the Sixth Circuit held that the employee failed to establish that he requested a

ransfer to another position within the company under a company olicy. In *Monette v. Electronic Data Systems, Inc.*, 90 F.3d 1173, 1183 6th Cir. 1996) the Sixth Circuit held that the disabled individual bears he initial burden of proposing an accommodation and showing that he accommodation is objectively reasonable. In *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633-34 (6th Cir. 1998) summary judgment for he employer was affirmed because the employee's proposal of "general and vague" accommodations such as a transfer to a position n an allergy-free environment, did not satisfy the employee's burden of proving that there was a position within the company for which she was qualified, and to which reassignment could have been a easonable accommodation. *Gantt v. Wilson Sporting Goods Co.* 143 F.3d 1042 (6th Cir. 1998) held that because the Plaintiff made no request or accommodation, the district court properly found that she failed o create an issue of fact as to whether or not the company failed to easonably accommodate her. *Id.* at 1047. In *Brown v. Chase Brass & Copper Co.* 2001 U.S. App. Lexis 15726 (6th Cir. July 10, 2001) the Court affirmed Summary judgment because the employee did not demonstrate that any of his requests were met or treated as a request or an ADA accommodation. In *Montgomery v. Alcoa, Inc.*, 2001 U.S. App. Lexis 8096 (6th Cir. April 27, 2001) summary judgment was upheld for the employer where the employee was found to not have nformed the company that he was limited by diabetes nor requested ny accommodations. In *Hinson v. Tecumeh Products Co.*, 2000 U.S. App. Lexis 26778 (6th Cir. October 17, 2000) the Court affirmed summary judgment for the employer finding that the Plaintiff never equested any accommodation from the company and the company s not required to speculate as to the extent of the employee's disability or the employee's need or desire for accommodation.

None of Mr. Gilmore's requests were discussed with him by nyone at GE, and no effort was made by GE to participate in an nformal, interactive process, or for that matter, any process to decide a proper accommodation for him pursuant to his numerous requests over seven months. *See* EEOC Regulations, 29 C.F.R. §1630.2(o)(iii)(3).

Mr. Gilmore was supposed to meet with the head of GE's Human Resources Department, Mr. Moody, to discuss the company's employee assistance program, and possible options concerning leave, but GE never followed through. The appropriate reasonable accommodation would have been best determined through a flexible, interactive process, that involved both parties to the situation. See *Grenier v. Syanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("the ADA, in its implementing regulations, require that the parties engage in an interactive process to determine what precise accommodations are necessary."

C. Because GE Failed to Engage in Any Undue Hardship Analysis -- Petitioner is Entitled to a Writ of Certiorari.

GE did not undertake any efforts to determine any "significant difficulty or expense" on any of Mr. Gilmore's requested accommodations. The ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9. The point of the ADA is to integrate people with disabilities into the economic and social mainstream, not isolate them from the workplace.

The Act defines "undue hardship" as an action requiring significant difficulty or expense when considered in light of various factors 42 U.S.C. § 12111(10)(A). The factors include the nature and cost of the accommodation, the size and resources of the covered entity, and the effect of the accommodation on the operations of the covered entity. 42 U.S.C. § 12111(10). Some courts have held that undue hardship analysis is fact intensive and rarely suitable for resolution on summary judgment. See *Humphrey* 239 F.3d at 1139. In

any event, most courts put the burden on the employer to show that a proposed accommodation would cause an undue hardship. *Barnett* 228 F.3d at 1113. *See also* 42 U.S.C. § 12112(b)(5)(A).

The Sixth Circuit held in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1198 (6th Cir. 1996) that once the plaintiff makes a prima facie case suggesting the existence of possible reasonable accommodations for which the costs did not clearly exceed the benefits (which Mr. Gilmore did), the employer bears the duty to establish that such accommodation would constitute an undue hardship to the employer. Mr. Gilmore suggests that even this very conservative reading of the statute has been ignored in practice by the Sixth Circuit.

Only "lip service" is paid to the employer's undue hardship burden if the Court ignores the reasonable accommodation interactive process as the EEOC mandates. Petitioner suggests to this Court that the Sixth Circuit is largely out of step with the other Circuits and employers aware of this situation ignore their responsibility under law with impunity.

II.

THIS COURT SHOULD ALSO GRANT CERTIORARI TO PROVIDE GUIDELINES TO EMPLOYERS AND EMPLOYEES ALIKE ON WHEN AN UNREASONABLE OFFER CAN BE REFUSED WITHOUT JEOPARDIZING THE STATUTORY PROTECTIONS GUARANTEED UNDER THE AMERICANS WITH DISABILITIES ACT.

This Court should also grant certiorari to provide guidelines to employers and employees alike on when an unreasonable accommodation offer can be refused without destroying the statutory protections guaranteed under the Americans with Disabilities Act.

In *Connolly, III v. Entex Information Services, Inc.*, 2001 U.S. App. Lexis 26802 (9th Cir. May 10, 2001) the employee complained that the company failed to enter into a good faith interactive effort to provide a reasonable accommodation. However, the company had offered Connolly a medical leave of absence; reduced the number of tickets assigned to him at one time; and made other workplace changes. *Connolly*, however, argued that he was not given the reassignment that he desired, and the Court noted that *Entex* was not required to give him the reassignment of his choice. *Citing Barnett v. U.S. Air, Inc.* 228 F.3d 1105, 1110 (9th Cir. 2001). "The goal is to identify an accommodation that allows the employee to perform the job effectively, not to provide the job of the employee's choice. *See Id.*

Conversely, as the Third Circuit explained *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999) that since the regulations required an interactive process to identify appropriate accommodations, it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process. *Id.* at 316. The Third Circuit also noted that interactive process avoids or reduces litigation. "We take this opportunity to observe that this protracted (and very much ongoing) litigation would likely have been unnecessary had the parties taken seriously the precepts announced in our opinion in *Mengine.*" *Id. citing Deane v. Pocono Med. Ctr.* (3rd Cir. 1998) 142 F.3d 138, 149 (3rd. Cir. 1998). The Court also noted that "as we explained in *Mengine*, the process must be interactive because each party holds information the other does not have or cannot easily obtain. We noted that 'employers will not always know what kind of work the worker with the disability can do, conversely, the worker may not be aware of the range of available employment opportunities, especially in a large company.'" *Taylor, Id. citing Mengine v. Runyon*, 114 F.3d 415, 420 (3rd Cir. 1997).

An off-hand remark mentioning a medical leave is not, in and of itself, an offer of a reasonable accommodation. It was not truly

meant to accommodate Mr. Gilmore's depression. It was meant to remove him from the workplace when he did not want nor need isolation. And, only much later in the briefing did GE finally seize upon this point which the Sixth Circuit exploited in affirming summary judgment. Obviously, the lower courts ignored the fact that there was no interactive process, and ignored Mr. Gilmore's requests for accommodation. Employees should not have to continually propose reasonable accommodations in the face of employer silence, and then risk losing a lawsuit on summary judgment. Until, and if, the employer engages in a good faith interactive process of trying to find an accommodation, which proposal involves keeping the employee in the workplace as long as he can perform the essential functions of the job with or without an accommodation, then the employer's obligations are satisfied. And, only then should the employee who rejects such accommodations be outside of the protections of the statute. But, the statement "did you consider a medical leave", which the employee does not want to take, not only for financial and practical problems, but so as not to be stigmatized, cannot be construed by a court as constituting a reasonable accommodations and satisfying the employer's burden, particularly on summary judgment.

In conclusion, this Court is asked to make it clear that the purpose of the Americans with Disabilities Act is to find ways to integrate the disabled into the workforce, not isolate them further. This Court is asked to conclude that if an employee refuses a reasonable accommodation after a good faith interactive process, that employee risks being outside of the scope of protections offered by the ADA. But, when an employee is offered an unpaid medical leave and does not want nor need to take it, that employee should not be considered outside of the scope of the Act's protection unless it was the end product of a good faith interactive process which concludes in accommodation or an undue hardship analysis.

III.

THIS COURT IS REQUESTED TO REAFFIRM THAT SUMMARY JUDGMENT IS INAPPROPRIATE IN ANY CASE IF BASED UPON A CONCLUSORY, HEARSAY AFFIDAVIT.

This Court has consistently emphasized that on a motion for summary judgment, federal courts must view the evidence in the light most favorable to the non-moving party, with all disputed facts and inferences drawn in favor of that party and against the moving party. *See e.g., General Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Summary judgment should seldom be used in cases alleging employment discrimination. *Haglof v. Northwest Rehab., Inc.*, 910 F.2d 492, 494 (8th Cir. 1990). "Caution is required in granting summary judgment especially under a statute that allows a trial by jury. . . ." *Visser v. Packer Engineering*, 924 F.2d 655, 660 (7th Cir. 1991). Judge Posner of the Seventh Circuit in *EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994), noted that "The *McDonnell-Douglas* standard was intended to make it easier for plaintiffs in discrimination cases to resist summary judgment." *Id.* at 747.

A judge is not to "weigh the evidence to determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. In *Archer v. Mesaba Aviation, Inc.*, 200 U.S. App. Lexis 6420 (6th Cir. April 3, 2000) (not recommended for full text publication), the court stated, "Significantly, credibility judgments or weighing of the evidence are prohibited during consideration of a motion for summary judgment." *Id. citing Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999). "When the non-moving party presents direct evidence refuting the moving party's motion for summary judgment, the court must accept the

evidence as true." *Archer, Id. citing Adams v. Metiva*, 31 F.3d 375, 383 (6th Cir. 1994). A court may only inquire into the implausibility of inferences from circumstantial evidence on summary judgment; it may not inquire into the credibility of direct evidence. *Id. citing Adams*, 31 F.3d at 382.

1. **The District Court, After Discussing A Proper Summary Judgment Standard, Ignored it in This Case**

GE, as the moving party, failed to properly support its motion for summary judgment by demonstrating a lack of evidence to support the nonmoving party's case or the absence of a material factual dispute on Mr. Gilmore's eight counts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1996).

The district court discounted, ignored, weighed and distinguished Mr. Gilmore's pretext, accommodation and retaliation evidence while ignoring completely GE's responsibility, as the moving party, to establish the absence of any genuine issues of material fact or Plaintiff's lack of evidence. The district court, on pages 6 through 8 of its Memorandum, recited the summary judgment standard, yet ignored it. Summary judgment is appropriate only where "There is no issue as to any material fact and the moving party is entitled to judgement as a matter of law." *Lasher v. Ford Motor Co.*, 785 F.2d 309 (6th Cir. 1996). A fact is material if its proof establishes or refutes one of the essential elements of the cause of action asserted by the parties. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1994). There is a genuine issue for trial when the evidence presents sufficient disagreement to require submission to a jury. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986). Where a non-movant presents evidence, more than his own pleadings and affidavits, which Mr. Gilmore did, which raises doubt as to the existence of a fact sufficient to require submission to the jury of a dispute over the fact, summary judgment is inappropriate. *Street v. J.C. Bradford & Co*, 886 F.2d 1472 (6th Cir. 1999).

2. **A Conclusory, Hearsay Affidavit Is Improper Evidence Upon Which to Circumvent the Constitutional Right to Jury Trial.**

Conclusory affidavits cannot be used to defeat summary judgment. In *Orthopedic & Sports Injury Clinic v. Wayne Laboratories, Inc.*, 922 F.2d 220 (5th Cir. 1991), the court rejected such an affidavit stating:

> White's affidavit is wholly or almost wholly conclusory and is not supported by sufficient facts. . . We have recognized that there is a level of conclusoriness below which an affidavit must not sink if it is to prove the basis for a genuine issue of a material fact.

Id. at 224-25; *see also Miller v. Citizens Security Group, Inc.*, 116 F.3d 343, 346 (8th Cir. 1997) (conclusory affidavits cannot create genuine issues of material fact).

Fed. R. Civ. P. 56(e) specifies that an affidavit be made on personal knowledge, setting forth such facts as would be admissible in evidence. Affidavits composed of hearsay, conclusions and opinions do not satisfy Rule 56(e) and must be disregarded. *Daily Press, Inc. v. United Press International*, 412 F.2d 126 (6th Cir.), *cert denied*, 396 U.S. 990 (1969).

3. **An Affiant Must Be Competent And Knowledgeable As To The Matters In His Affidavit**

Marolda's Affidavit attempts to authenticate all GE documents. To the extent that documents are authenticated by an affidavit, the affiant must be a person through whom the exhibits could be admitted into evidence. GE cannot qualify Marolda as the records custodian merely because he is the Reuter-Stokes President, particularly because

he was there the entire time. Such a move, at best, is a sham and, at worst, is a fraud on the court.

"To be admissible in evidence, statements in an affidavit must be limited to facts and the facts alleged must be based upon personal knowledge." Wright, Miller, Kane, 10A Federal Practice & Procedure, §2738, p. 486. "To be admissible, hearsay statements in an affidavit and parol evidence must fall within an appropriate exclusionary portion of the rules of evidence in order to be considered on summary judgment." *Id.*, §2738, pp. 478-79. "Thus, ultimate or conclusory facts and conclusions of law, as well as statements made . . . 'on information and belief' cannot be utilized under summary judgment motions." *Id.* at §2738, pp. 486-89. An affidavit containing rumors, conclusory allegations and subjective beliefs are insufficient to establish a party's position as a matter of law. *Mitchell v. Toledo Hosp.*, 964, F.2d 577, 585 (6th Cir. 1992); *Chappell v. GTE Products Corp.*, 803 F.2d 261-268 (6th Cir. 1996) ("Mere personal beliefs and conjectionary speculations are insufficient in an affidavit.")

Mr. Gilmore motioned the district court to strike paragraphs one through eight from the Affidavit of Mr. P.J. Marolda because they are based on hearsay and wholly lacking in evidentiary foundation. The Motion was denied. Mr. Marolda was (1) not the President of GE Reuter-Stokes for much of the time period he discusses, and he had no involvement with Mr. Gilmore; (2) in paragraphs three and four Mr. Marolda paraphrases from a written performance appraisal done by another person; (3) in paragraph five, he states, "I received a memorandum from W.W. Phelan . . . which stated that ESSROC, a key Reuter-Stokes customer, had complained to him . . . and ESSROC strongly objected to the conduct. . . ." Mr. Marolda has no personal knowledge. He based this paragraph on thirdhand information provided by Mr. Phelan who, during his deposition, could not even remember who gave him the information in the first place. Mr. Phelan's memo was not substantiated by ESSROC; (4) in paragraph six, Mr. Marolda references someone else's telephone call to Mr.

Gilmore; (5) in paragraph eight, he claims that all the documents attached to GE's Motion for Summary Judgment are "true and accurate copies of documents which are contained in a file maintained by me or under my custody and control and in the regular course of business." Mr. Gilmore's file was not maintained by Mr. Marolda. The January, 1997 performance appraisal was handed to Gilmore just before being fired; (6) memos from Mr. Glesius and Mr. Forland were not kept in the ordinary course of business; they were specifically prepared for Ms. Embrescia and were not maintained until this litigation commenced; (7) the voice-mail message from Ms. Embrescia to Mr. Marolda, Ms. Embrescia's notes, Mr. Forland's memo, and the feedback from Mr. Forland are all improperly authenticated, contain hearsay and are improperly designated as "business records."

4. Direct Evidence of Discrimination Is Not Required By This Court At Any Stage.

In *Kline v. Tenn. Valley Authority*, 128 F.3d 337, 342-47 (6th Cir. 1997) the Sixth Circuit decided that a plaintiff need only present a prima facie case under the *McDonnell-Douglas* test and evidence of the employer's prevarication to raise an inference of discrimination. The district court decided that the process used to choose another employee over Kline did not discriminate by race. The Sixth Circuit reversed holding that the district erred in holding that Kline was required to produce "direct" evidence of discrimination in addition to proving the prima facie case. "The import of the *Kline* decision is that once a plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination." *Id.* at 347. The Sixth Circuit has adhered to the *Kline* standard in other cases as well. In *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 421 (6th Cir.) (petition for *cert filed*), 60 U.S.L.W. 3292 (1999), the court affirmed a jury verdict where the primary evidence was proof of fraud in the company's ranking policy. In *EEOC v. Yenkin-Magistec Paint Corp.*, 112 F.3d 831, 835 (6th Cir. 1997), the court held that the law allows a fact finder to infer intentional

discrimination for proof of the prima facie case coupled with the disbelief of the proper reasons for the employer's actions.

But, the Sixth circuit ignored its precedent in this case. GE's indefensible and vacuous excuse against the backdrop of Mr. Gilmore's prima facie case warranted at least a permissive inference of discrimination. *Chapman v. AI Transport*, 180 F.3d 1244, 1250 (11th Cir. 1999). However, the district court's "pretext plus" approach to Mr. Gilmore's evidence judicially preempted the fact-sensitive question of an employer's intent that this Court and Congress entrusted to a jury. Congress has expressly provided for jury trials in ADA cases. As the court in *Kline* noted, "The district court placed a nearly impossible burden on Kline requiring direct evidence of discrimination. Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing*, 503 U.S. 133 (2000). This is the reason for the *McDonnell-Douglas-Burdine* burden of proof mechanism, allowing a plaintiff to prove its case through circumstantial evidence." *Kline*, 128 F.3d at 347.

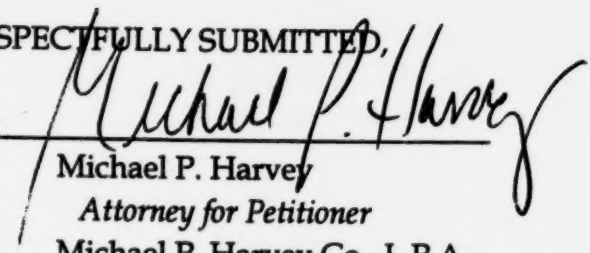
Mr. Gilmore's prima facie case should not have been discarded merely because the lower courts did not like his pretext evidence. A prima facie case under *McDonnell-Douglas* raises an inference of discrimination. It is presumed that these acts, if otherwise unexplained, are more likely than not based upon impermissible factors. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575 (1978). This Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1991) stated that the defendant has the burden, by a preponderance of the evidence, to show legitimate nondiscriminatory reasons for the challenged employment action. The court held that, "The defendant's explanations for its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair

opportunity' to demonstrate pretext." *Id.* at 258. Mr. Gilmore was not given the appropriate inferences and presumption of the truth of his allegations. Had the lower courts done so, this case would have been presented to a jury for determination.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPECTFULLY SUBMITTED,

By: 

Michael P. Harvey
Attorney for Petitioner
Michael P. Harvey Co., L.P.A.
311 Northcliff Drive
Rocky River, Ohio 44116-1344
Phone: (440) 356-9108
Fax: (440) 356-9128
E-mail: MPHarveyCo@aol.com
Web: MPHarveylaw.com

FILED
October 01 2001
LEONARD GREEN, Clerk
NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

APPENDICES

United States Court of Appeals for the Sixth Circuit

No. 00-3382

GREGORY C. GILMORE,
Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY, GE POWER SYSTEMS,
Defendant-Appellee

Decided: October 1, 2001

Before: BOGGS, DAUGHTREY, and WALLACE,*** Circuit Judges.

PER CURIAM. The plaintiff, Gregory Gilmore, filed this action in district court following his termination from employment with GE Reuter Stokes, a division of defendant General Electric Co.

***The Hon. J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

His principal allegation was that he had been fired in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, simply because he suffered from depression. GE denied any discriminatory motive in its decision and moved for summary judgment in its favor. The district court granted that motion, determining that Gilmore had made out a prima facie case of discrimination under the Americans With Disabilities Act, but concluding both that the defendant had offered a non-discriminatory reason for its action and that Gilmore was unable to advance a genuine issue of material fact supporting a determination that GE's decision was a pretext for prohibited discrimination,

On appeal, Gilmore argues that the district court erred in making factual findings in the face of disputed evidence, that the district court improperly weighed the plaintiff's pretext evidence and inappropriately held Gilmore to a "pretext plus" burden of proof, and that the summary judgment ruling erroneously dismissed related state law and retaliation claims. For the reasons set out in the district court's extensive and well-reasoned memorandum opinion, however, we conclude that summary judgment was properly entered in this case.

As noted by the district judge, the fact that Gilmore failed to suggest any reasonable accommodation for his disability is particularly damaging to his case. Admittedly, he sought altered work schedules, quieter working space, and other concessions not available to similarly-situated employees. Nevertheless, in no instance did he inform his employer that he was seeking changes *because* of his disability. In fact, he concedes that he hid from the defendant the fact that his depression might have been affecting the quality of his work "because of all the social stigma associated with [his condition.]" Furthermore, when his employer offered him a medical leave so that he could regulate his medicines and become a more productive employee, Gilmore declined the offer without further discussion with his supervisor.

The district judge meticulously examined Gilmore's claims and the evidence offered in support of them. She also correctly applied the appropriate law to those allegations in a thorough opinion. Because no jurisprudential or precedential purpose would be served by again reciting the facts, law, and analysis recounted by the district judge, we decline to issue an additional detailed opinion, and, instead, AFFIRM the grant of summary judgment to the defendant on the basis of the district court opinion filed on February 22, 2000.

FILED
00 FEB 22 PM 3:06

NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Dated February 22, 2000)

GREGORY C. GILMORE,	)	
	)	
Plaintiff	)	Case No. 1:98 CV 2185
	)	
v.	)	**Memorandum of**
	)	**Opinion and Order**
GENERAL ELECTRIC COMPANY,	)	
GE POWER SYSTEMS,	)	
	)	
Defendant	)	

Introduction

This matter is before the Court upon defendant's Motion for Summary Judgment (Doc. 38). This case arises out of defendant's alleged failure to accommodate plaintiff and his termination from employment allegedly on the basis of his depression. For the following reasons, the Motion is GRANTED.

Facts

Plaintiff, Gregory Gilmore, filed this lawsuit against defendant, General Electric Company, GE Power Systems. Plaintiff began his employment with GE Reuter-Stokes (hereafter, Reuter-Stokes) in Ohio in 1994 as a Senior Engineer. (P.J. Marolda aff.)* Prior to that plaintiff had been employed by GE Nuclear Energy in Wilmington, North Carolina as an engineer since 1990 and had worked for GE as a student since 1984. (Pltf. Depo. At 7; pltf. Aff.)

In August 1995, plaintiff was assigned to the Environmental Products Team and reported directly to Karen Embrescia, Environmental Team Manager, and Chris Foreland, CEMS Product Line Manager. In late 1996, Forland was replaced by Hesh Elghoroury to whom plaintiff then reported indirectly. (*Id.*) Embrescia's direct supervisor was P.J. Marolda, who was the President of Reuter-Stokes by early 1997. (Embrescia at 13). Prior to this time, plaintiff was directly managed by Frederick Glesius who evaluated plaintiff's performance in August 1995 wherein plaintiff received an "exceeds" performance and a performance trend of "increasing". (Glesius depo at 4, 7-8; Ex. U).

---

*Plaintiff has filed a Motion to Strike paragraphs one through eight of Marolda's Affidavit (Doc. 55). The Motion is denied as to paragraphs one and two as there is no evidence the affiant does not have personal knowledge of these facts. The Motion is denied as to paragraph three to the extent it merely incorporates the April 1996 appraisal which is also offered into evidence by plaintiff and as an exhibit to Embrescia's deposition. The Motion is denied as to paragraph 4 for the same reason. The Motion is denied as to paragraph 5 to the extent that it incorporates the Memorandum attached to the affidavit and which was sent personally to Marolda. As to paragraph 6, the Motion is denied as immaterial regarding the referenced telephone call as this is attested to in plaintiff's own affidavit and the remainder is on Marolda's personal knowledge. The Motion is denied as to paragraph 8 to the extent that the referenced documents are properly incorporated by affidavit or deposition elsewhere in these proceedings and for the foregoing reasons properly submitted with Marolda's affidavit.

appraised his performance from August 1995 through April 1996 and states in pertinent part:

> Greg is technically knowledgeable, however, he is very reluctant and unwilling to share information. Greg responds with one word response that gives one little or no information. Other times he responds I don't know or questions the question asked of him. One must continually dig and probe each step of the way to search for what Greg knows or what he may need to come up with an answer. One must keep offering statements to try to get information from Greg. His responses have been extremely judgmental, critical or condescending. It becomes very time consuming and tiring to communicate and work with Greg. When someone questions Greg to better understand how he has reached a conclusion or get clarify, he responds by getting upset, angry and walks out of the meeting. This has impacted the team in a negative sense as other team members try to avoid him rather than to continually coax or coddle him to support team work. Customer feedback has also indicated communication issues with Greg. Greg's disruptive behavior has made it very difficult as a team to meet the challenges of the Stak-Trackers re-engineering project, implementing the engineering changes and focusing on customer demands for warranty upgrades as well as new units.

(Embrescia Ex. A). Embrescia rated his performance as "unsatisfactory" and his performance trend as "declining." (*Id.*) In the "employees comments" section, plaintiff responded,

> I am capable of immediately reversing this horrible trend. I shall immediately change. I wish this written appraisal had been given immediately to me at the first

> I am capable of immediately reversing this horrible trend. I shall immediately change. I wish this written appraisal had been given immediately to me at the first of the year when this behavior began. I was told orally in the appraisal meeting that the poor behavior began in the first of 1996. I would like another written appraisal in 3 months.

(*Id.*) As part of the appraisal, plaintiff was given a "Performance Improvement Plan: which listed four items:

> Greg needs to change his communication style such that he does not continue to conduct himself in a manner which is disruptive to others.
>
> Greg needs to change his communication style that he does not continue to conduct himself in a manner that is obstructive to others and unwilling to share information.
>
> Greg needs to be a team player; less rigid and more flexible in his dealings with others.
>
> Greg needs to stop talking down to others, or implying stupidity in others in his communications with peers, subordinates, leaders and customers.

(*Id.*)

Plaintiff was diagnosed with depression[2] in January 1996 and began treatment immediately with medication. Plaintiff had been experiencing difficulty concentrating, working, sleeping and getting out of bed as well as dizziness and impaired judgment in the latter

---

[2]Plaintiff's affidavit characterizes his diagnosis as "severe depression" while his doctor's expert report states the diagnosis as "mild to moderate endogenous depression." (Ex. 4A).

(pltf. aff.). The medication did not correct all of the difficulties plaintiff had been experiencing. (pltf. depo. At 130).

Several weeks prior to his April 1996 evaluation, plaintiff met with Embrescia and she asked him whether he had emotional problems. Plaintiff told her he did not. Plaintiff did not tell her about his depression because he was "very reluctant to talk about it" and "didn't see any need to tell her." One week after the April 1996 evaluation, and because of the evaluation, plaintiff met with Embrescia and told her he was suffering from depression and that he was taking medication. (pltf. depo. At 38-42. 46-48). Embrescia took notes at their meeting. Embrescia's notes, submitted by both plaintiff and defendant, reflect that plaintiff did not tell her specific symptoms of his depression which he apparently characterized as "seasonal lack of the sun." He stated that he had to "live one day at a time" and it "takes everything from him to get out of bed in the morning." He also indicated that he "felt most of [his] problems were either due to [Embrescia], Chris [Forland] or Fred [Glesius]. (Ex. J) (Embrescia depo. Ex. J). Embrescia inquired whether he considered a medical leave. (*Id.*) Plaintiff declined the offer because he was fearful for his job. Plaintiff did not ask for reduced hours or for coaching for his communication skills at that point. (pltf. depo. At 48, 72).

Embrescia evaluated plaintiff again in January or February 1997. Although his performance was still rated as "unsatisfactory," his performance trend was "stable." (Embrescia depo. Ex.).

P.J. Marolda received a memorandum from W. W. Phelan, the Vice President of Marketing and Sales for Reuter-Stokes, dated February 19, 1997. (Marolda aff.; Ex. C). The memorandum concerns ESSROC, "a key Reuter-Stokes customer." (Marolda aff.). Phelan relates in the memorandum that he met with ESSROC the previous day regarding the status of a project and was informed that "ESSROC is not satisfied with the performance of Greg Gilmore." ESSROC indicated that plaintiff's poor performance was badly affecting Reuter-

Stokes' image. After the meeting, Phelan met privately with Hesh Elghoroury, the Reuter Stokes project manager, who indicates that plaintiff was "arriving late and leaving early" and that there was "not good communication between [plaintiff] and ESSROC's site personnel." (Ex. C).

On February 22, 1997, Embrescia telephoned plaintiff at his home and informed him that was suspended with pay as a result of a serious customer complaint. (Marolda aff; pltf. aff.). Marolda decided to terminate plaintiff's employment after consulting Embrescia, Gelsius, Elghoroury and Joseph Mooney, the Human Resources Manager, regarding the recent customer complaint and plaintiff's overall performance. (Marolda aff.). Marolda notified plaintiff on February 25, 1997 that he was terminated for unsatisfactory performance and attitude. (*Id.*; pltf. aff).

Plaintiff thereafter filed this Complaint setting forth eight claims. Count One alleges that defendant's harassment and termination on the basis of his disability violate the Americans with Disabilities Act (ADA). Count Two alleges that defendant's failure to reasonably accommodate plaintiff violated the ADA. Count Three alleges that Title VII has been violated because plaintiff was treated differently in compensation and in terms and conditions of employment because of his disability. Count Four alleges retaliation because he asserted his ADA rights. Count Five alleges defamation. Count Six alleges that the defamation caused him intentional infliction of emotional distress. County Seven also appears to allege defamation. Count Eight alleges a violation of the Ohio Revised Code, wrongful discharge and breach of implied contract.

Standard of Review

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)

(citing Fed R. Civ. P. 56(c)); *see also LaPoint v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in light most favorable to the nonmoving party. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.* 759 F.2d 557, 562 (6th Cir. 1985). However, the nonmoving party may not simply rely on

its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. . *American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citation omitted).

Discussion

4. Counts 1 and 8 (ADA and Ohio's anti-discrimination statute)

As with other employment discrimination cases, "[u]nder the ADA, in the absence of direct evidence of disability discrimination, a plaintiff may seek to establish a prima facie case of discrimination. Once established, a prima facie case shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for its action. If the employer articulates such a reason, the plaintiff must then show that the reason given by the employer is pretextual in order to prevail." *Sullivan v. River Valley School District*, 197 F.3d 804, 810 (6th Cir. 1999), citing §§42 U.S.C. 12101 *et seq.; Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178, 1184-86 (6th Cir. 1996); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed. 25 668 (1973).

To establish his prima facie case of discrimination under the ADA, plaintiff must show that (1) he is a disabled person within the meaning of the Act, (2) he is otherwise qualified to perform the

essential functions of his job with or without reasonable accommodation, (3) he suffered an adverse employment decision due to his disability, (4) the employer knew or had reason to know of the plaintiff's disability and (5) the position remained open while the employer sought other applications or plaintiff was replaced. *Walsh v. United Parcel Service.* - F.3d -, 2000 WL 10605 (6th Cir. 2000).

The ADA "defines a disabled person as one who (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such impairment, or (3) does not have an impairment, but is regarded as having one." *Sullivan*, 197 F.3d at 810, citing § 42 U.S.C. 12102(2).

The Sixth Circuit has stated that Ohio's handicap discrimination law does not simply parallel the ADA. *Gray v. Champion International Corp.*, No. 96-3762, 1997 WL809969 (6th Cir. 1997). Ohio Revised Code § 4112.02 provides:

> It shall be unlawful discriminatory practice; (A) For an employer, because of...handicap...to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

In *Gray*, the court stated,

We have read that law to require that, to survive summary judgment:

> [T]he plaintiff must show that there is a genuine issue of material fact that: 1) she is handicapped, 2) action was taken by her employer, at least in part because she is handicapped, and 3) she can safely and substantially

> perform the essential functions of the job in question with reasonable accommodations.

Id. at *3, citing *Blakenship v. Martin Marietta Energy Sys., Inc.* 83 F.3d 155 (6th Cir. 1996). The court further noted, "The second part of this test requires [plaintiff] to show that [defendant] acted directly because of his disability, rather than because of conduct caused by his disability." *Id.*

Defendant argues that plaintiff was not disabled. Defendant asserts that plaintiff cannot show that the major life activity of working was substantially limited inasmuch as he has testified that he has been employed continuously as an engineer for another company for two years since his discharge from Reuter Stokes.

Plaintiff was discharged from his employment with defendant in February 1997 and began the new employment in May 1997. (pltf. depo. At 195). However, this does not establish that plaintiff was not impaired during the time at issue in this lawsuit.

Defendant points to other deposition testimony of plaintiff arguing that he has not shown that any of his complaints were the result of his depression. However, the Court finds that there is enough evidence showing that plaintiff had a mental impairment that substantially limited one or more of his major life activities.

Some courts have held depression to qualify as a disability for purposes of the ADA. However, the inquiry made in each case is whether the depression limits the plaintiff's ability to perform a major life activity. See *Schneiker v. Fort Insurance Co.*, - F.3d-, 2000 WL 10251 (7th Cir. 2000), *Winkle v. Southwestern Bell Telephone Co.*, 195 F.3d 415-8 (8th Cir. 1999) and *Oblas v. American Home Assurance Co.*, No. 98-9350, 1999 WL 759026 (2nd Cir. 1999).

In his affidavit plaintiff avers that his doctor diagnosed his depression in January 1996 and

> After seeking Dr. Jankowski, I realized some of the problems I was experiencing in the latter part of 1995 were related to my depression, but I did not realize it then. The problems I was experiencing including difficulty concentrating, working, sleeping, dizziness, difficulty getting out of bed, and my judgment was severely becoming affected. I also had difficulty in my marital relations and experienced many other problems.

(pltf. aff.). Plaintiff's wife also attested that plaintiff had trouble sleeping, could not get out of bed, could not concentrate, communicate or socialize and was listless. (Tina Woods Gilmore aff.). Plaintiff avers that although he began to improve after his doctor prescribed Prozak, he had to change medications and dosages numerous times. Plaintiff avers that he currently takes anti-depressant medications. (pltf. aff.) The Court finds that plaintiff has presented enough evidence to satisfy the element of the prima facie requiring that he be disabled. Although not specifically listed in the non-exclusive list of major life activities in the Code of Federal Regulations interpreting the ADA, the Court finds that sleeping is a major life activity and it appears plaintiff's work was impaired because he could not concentrate or communicate and that his judgment was impaired.

Next, defendant contends that Reuter-Stokes lacked knowledge of plaintiff's disability. However, defendant's argument relies exclusively on the fact that defendant did not know of plaintiff's disability prior to his April 1996 evaluation. Defendant argues that the "relevant time" for determining whether defendant had knowledge is April 1996 when Embrescia prepared plaintiff's performance evaluation and allegedly formed the intent to discharge plaintiff. Defendant asserts that it "had no knowledge of [plaintiff's] claimed

disability at the time [plaintiff] alleges that the discriminatory animus arose." (Motion at 14, Reply at 3 and Reply fn.1).

However, the Court does not look to whether defendant knew in April 1996 that plaintiff was depressed but rather whether it had knowledge when it allegedly failed to accommodate him and terminated plaintiff allegedly on the basis of his disability. This element of the prima facie case is satisfied as defendant had knowledge of plaintiff's depression at these times.

The final element of the prima facie case which defendant asserts has not been met is that which requires that plaintiff be replaced. However, defendant states plaintiff "was not replaced by any employee at Reuter-Stokes and there are no plans to replace him. See Marolda affidavit." (Motion at 15). However, Marolda's affidavit does not address whether or not plaintiff was replaced. In response, plaintiff points to a February 1997 letter written by W.W. Phelan, defendant's Vice President of Marketing and Sales, to John Powell, a representative of ESSROC, which states that Reuter-Stokes no longer employed the individual whom ESSROC was dissatisfied with and further states, "In addition to continuing to provide day-to-day support, both on-site and at our Twinsburg, Ohio facility by our CEMS Project Manager, Hesh Elghoroury and our technical support team, we have hired a GE Field Engineer to further enhance our technical on-site support capability to meet ESSROC's expectations." (Phelan Ex. AA). Defendant does not address this evidence and this Court will assume that plaintiff satisfies this element.

Plaintiff having satisfied prima facie case, defendant asserts a nondiscriminatory reason for plaintiff's discharge. Defendant states plaintiff "was discharged because of a serious customer complaint, unsatisfactory performance and attitude."

Plaintiff makes the following arguments in support of his contention that the reasons for his termination were actually a pretext for discrimination.

Plaintiff asserts that the customer complaint was a pretext. Plaintiff argues that ESSROC had prior complaints concerning defendant's product, Stak-Tracker, so that this could not have been a legitimate basis for terminating plaintiff. Plaintiff points to the deposition testimony of Hesham Elghoroury who testified that defendant was having problems with Stak-Tracker, Fred Glesius' testimony that defendant was having a "tremendous number of problems with Stak-Tracker and that the operational problems with the product were not plaintiff's fault and Warren Phelan's testimony that there were numerous complaints about the operations of the Stak-Tracker in general. Additionally, plaintiff argues that plaintiff, himself, had complained to defendant about Stak-Tracker just prior to his April 1996 evaluation. Plaintiff averred that he was "assigned to provide field service of the Stak-Tracker which did not work properly. I was constantly required to deal with angry customers (e.g., ESSROC) who had spent a lot of money on a system that simply did not work." (pltf. aff.).

The Court does not find this to show pretext. Marolda's affidavit testimony is that he terminated plaintiff based, *inter alia*, on "this latest customer complaint" communicated to him by the memorandum from W.W. Phelan. The Phelan memorandum indicates that the ESSROC was dissatisfied with plaintiff's "performance" at the site including the time he was spending on site, that plaintiff was arriving late and leaving early and that there was not good communication between plaintiff and ESROC's site personnel. (Phelan Ex. 2). Therefore, the fact that the technical or operational aspects of the product itself at the site were unsatisfactory does not contradict the evidence that ESSROC communicated its disappointment in plaintiff's *performance* on the site.

Second, plaintiff argues that the negative April 1997 shortly after receiving an excellent performance rating in September 1995 by Glesius is evidence of pretext. In this regard, plaintiff asserts that he received the poor evaluation after Embrescia suspected he had medical problems and posits, "Is it only a coincidence that his performance allegedly dipped after [defendant] confirmed he had depression and after he complained to the President of GE about the product?" (brief at 30).

This does not show pretext. Plaintiff is not alleging that the April 1996 review was discriminatory but complains that the ADA was violated when defendant failed to accommodate him after he told Embrescia about his depression following the April 1996 evaluation and when defendant terminated him in February 1997. Furthermore, plaintiff testified that while Embrescia asked him prior to the April 1996 review whether he was having emotional problems, he denied it and he was determined not to "reveal the secret" of his depression. Thus, there is no evidence that Embrescia had any knowledge of a disability at the time she completed the April 1996 review. In addition, if defendant decided to punish plaintiff after he complained about the product, this is not violative of the ADA and, thus, does not show pretext.

Third, plaintiff argues that defendant never followed its own progressive discipline policy before it terminated him. Plaintiff points to his own affidavit testimony regarding the GE handbook and a progressive disciplinary procedure, submits a document entitled "Positive Action Procedure" (Ex. G) and points to deposition testimony of various of the defendant's representatives which plaintiff believes verifies that such a policy exists. However, there is no indication as to whether any policy or procedure was part of an employee handbook or whether it formed any contractual obligation or was merely a policy.

Assuming such a progressive discipline was in effect which defendant was required to follow (or which it regularly followed for other employees), plaintiff does not explain how defendant did not adhere to this policy. Further, the evidence shows that in the April 1996 evaluation plaintiff was placed on a four point "performance improvement plan." Plaintiff discussed the evaluation with his supervisor. Plaintiff avers that at the time of his termination he was also handed the 1997 performance appraisal which indicates unsatisfactory performance with a stable performance trend. This appraisal, plaintiff points out, had no performance improvement plan. However, in the absence of any explanation from plaintiff as to how defendants violated a progressive disciplinary policy, no pretext is shown.

Fourth, plaintiff argues that defendant was motivated to find an event which could justify terminating plaintiff as evidenced by the facts that Embrescia was not qualified to be in her position because she had only completed high school and did not understand the technical aspects of the projects plaintiff was working on, the customer complaint was not investigated, when plaintiff was notified of his suspension and termination he was told which customer complained about him, plaintiff's final 1997 evaluation was handed to him at his termination meeting, following his termination he was escorted off defendant's premises and he was not given an opportunity to respond to the alleged ESSROC concerns.

For the following reasons, the Court does not find that any of these arguments establish pretext.

Plaintiff cannot show pretext by undermining Embrescia's abilities. Even assuming she is not as technically able as plaintiff, her evaluation shows that she praised his technical skills while criticizing his interpersonal skills.

evaluation shows that she praised his technical skills while criticizing his interpersonal skills.

Plaintiff asserts that the customer complaint was not investigated. However, the following evidence submitted by plaintiff does not support this assertion.

Plaintiff points to Phelan's[3] deposition testimony that without his notes he was not sure which individual from ESSROC made the complaint and that he was not sure John Powell (ESSROC's director of purchasing) was at the meeting where plaintiff's performance was discussed even though in Phelan's memorandum he stated that Powell had made the complaint. This does not undermine Phelan's credibility given that he stated in his deposition that he had made notes regarding the meeting but that he did not have them with him and a letter drafted the day after the meeting to Powell states that Phelan meet with him regarding the complaint.

Plaintiff also asserts that Phelan did nothing to investigate the complaints pointing to his testimony that he had never had a customer lie to him and so he "took it at his word." However, plaintiff fails to point to the remainder of Phelan's testimony that defendant's project managers reinforced the statement. Phelan's memorandum also stated that he spoke independently with the project managers who confirmed plaintiff's performance at the site.

Plaintiff also points to Phelan's testimony that ESSROC did not specifically ask that plaintiff not return to the site or that he be terminated, that he did not want to aggravate the ESSROC situation by having plaintiff return to the site but that plaintiff did return to the site before his termination, that the only concerns raised were that plaintiff was arising late and leaving early and failing to provide

---

[3]Phelan authored the memorandum to Marolda regarding the customer complaint.

these problems with plaintiff, that he did not know how many times it occurred, that when plaintiff went out to the sites he was not required to punch in and out and that Phelan did not recommend plaintiff's termination. None of this testimony undermines defendant's judgment in deciding to terminate plaintiff. It is irrelevant whether ESSROC wanted plaintiff fired. Moreover, this Court is not permitted to decide whether termination for the concerns raised (i.e., arriving late, leaving early and failing to provide feedback) was fair. *Tobbit & Castlement*, 123 F.3d 899, 898 (6th Cir. 1997) (citations omitted) ("'An age discrimination action is not 'a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities.'")

Similarly, plaintiff points to Hesh Elghoroury's deposition testimony that ESSROC did not request that plaintiff be terminated, there was no written job description for his position, he was unaware of any complaints about plaintiff's communication problems prior to the meeting with ESSROC, he did not remember seeing any written reports complaining about plaintiff, there was no specific dates given as to plaintiff's arriving or leaving the site and the entire team was frustrated with the Stak-Tracker project and plaintiff had expressed his concerns. Nor does this testimony bolster plaintiff's assertion that the ESSROC complaint regarding plaintiff's personal performance was somehow unfounded.

Plaintiff asserts pretext is shown because he was notified of his suspension and termination he was not told which customer complained about him, his final 1997 evaluation was handed to him only at his termination meeting and following his termination he was escorted off defendant's premises. Plaintiff does not explain how these show pretext.

Finally plaintiff asserts that defendant did not allow him to respond to the customer complaint. However, the testimony plaintiff

points to actually shows that the customer complaint had merit. Plaintiff points to his deposition testimony that at times he was waiting at the hotel for something to happen in the office before there was any work to be done at the site, that part of the problem was a very snowy winter that year, and that he was not getting enough sleep and so could not get up early enough to get to the site on time and that at times he received conflicting instructions from his supervisors. If anything, this shows admission that he was not always at the site when expected.

For the foregoing reasons, plaintiff has not created an issue of fact as to whether defendant's reason for his termination was pretextual and Counts One (ADA) and Eight (Ohio Revised Code) fail. Count Eight also alleges wrongful discharge in violation of public policy, breach of implied contract and common law discrimination. This portion of the claim fails for the same reasons discussed above.

Moreover, plaintiff's own affidavit testimony calls into question whether he believed he was terminated because of his disability. He avers:

> According to the GE "Integrity - The Spirit and the Letter" if an employee has an environmental concern, he should talk to a GE manager. Since I had already talked to my immediate manager and two indirect managers, I went to their boss, Mark Savoff. After being told that the only problem with Stak-Tracker was me, then later after being fired, I explained the Stak-Tracker problems to the ombudsman - - without response.
>
> I believe GE went after me by giving me a poor evaluation in April, 1996, then let me languish for a few months to set up a bogus customer complaint

> situation that eventually they claimed led to my termination.

(pltf. aff. ¶¶ 102, 103). Therefore it appears that plaintiff himself believed he was targeted for complaining about Stak-Tracker.

5. Count 2 (ADA-Failure to Accommodate)

In *Penny v. United Parcel Service*, 128 F.3d 408, 414 (6th Cir. 1997) the Sixth Circuit stated, "To prevail on a failure to accommodate claim, an employee must shown: (1) that he is disabled; (2) that he is qualified for the job with or without reasonable accommodation; and (3) that he was denied a reasonable accommodation." (citations omitted).

The initial burden of requesting an accommodation is on the employee. *Gant v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998). Furthermore, the employee must show that the accommodation is "objectively reasonable." *Keys v. Joseph Beth Booksellers, Inc.*, No. 97-6511, 1999 WL 97003 (6th Cir. 1999, citing *Monette v. Electronic Data Sys. Corp.* 90 F.3d 1173 (6th Cir. 1996). This burden "need not be onerous. For the purposes of a prima facie showing, a plaintiff must merely suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Keys* at *1.

Plaintiff argues that defendant refused to provide him a reasonable accommodation. However, most of the evidence plaintiff points to cannot be construed as a request for an accommodation. For instance, plaintiff vaguely asserts that defendant failed to "support" him and after he admitted his depression defendant did nothing to help him; he avers that following the April 1996 appraisal he requested of Embrescia an interim written performance appraisal three months hence and for immediate feedback which he did not receive; he asserts that he never got enough technical support in the

field but relies on his deposition testimony related to his job reassignment in September 1995; he points to his own testimony that in hindsight he would have asked for some technical support and that he felt Embrescia should have been more concerned or sympathetic with his performance problems; and he asserts that he was given more job duties. However, there is no articulated request for an accommodation. See *Keys, supra* (plaintiff's request to his supervisors that "they work with him until he could get his condition under control" was insufficient to show plaintiff proposed an accommodation.)

Additionally, plaintiff asserts that he asked Embrescia's approval to look for another job within the company. However, his testimony shows that he got her required approval. (pltf. depo. at 53, 59-60, 62). Plaintiff points to his deposition testimony regarding reducing his hours. However, the testimony does not show that he actually asked for his accommodation. (*Id.* At 74). Plaintiff points to his testimony that Chris Forland said he felt plaintiff needed instruction on how to talk to the customers. (*Id.* At 87). However, the testimony does not show that plaintiff requested this accommodation and, in fact, he testified that he never investigated the availability of courses or seminars offered by defendant because he did not have the time to take a class. (*Id.*) Plaintiff asserts that defendant should have given him job coaching or set up a class for him somewhere. However, the testimony does not show that plaintiff requested coaching and, in fact, his testimony is, "At the time I don't know whether I wanted it or not." Rather, he states in hindsight, "I believe I needed coaching." (*Id.* At 88). Clearly, the ADA does not allow for accommodations requests to be stated after the fact.

Plaintiff testified that he asked that if he arrived home very late from traveling that he not be required to work first thing in the morning. However, plaintiff testified that he did not remember requesting this in relation to his depression. In fact, plaintiff testified that he "was very, very reluctant to talk and discuss [his] depression

because of all the social stigma associated with it." (pltf. depo at 37, 74-76). Plaintiff also testified that he asked Embrescia for a quieter office but she would not move him even though there were empty offices. However, plaintiff also testfied that he did not indicate that he needed a quieter space because of his depression inasmuch as he did not want to discuss his medical problems with Embrescia. (*Id.* at 53, 85-86). Although plaintiff seems to assume that Embrescia should have known that these requests were necessary due to the problems caused by his depression, plaintiff had an obligation to sufficiently relate these accommodations to his disability.

Finally, plaintiff also avers "In terms of accommodations, I think that GE could have provided me with job coaching to improve my communication skills, accommodation on travel, being able to come in later, moving me to a quieter place, given me some time for my medications to work, giving me more frequent feedback more feedback from supervisors who knew my job qualifications and who I was working with. I did not get any of this." However, this averment does not show that plaintiff *actually asked* for the specific accommodations.

For these reasons, plaintiff has not shown that he was denied a reasonable accommodation which he requested.

(3) Count 4 (ADA-Retaliation)

"To Present a prima facie case of retaliation under the ADA, a plaintiff must demonstrate: (1) that he was engaged in protected activity; (2) that he was the subject of an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse employment action." *Wellman v. Wheeling and Lake Erie Railway Company* No. 97-3084, 1998 WL 25005 (6th Cir. 1998), citing *Canitia v. Yellow Freight System, Inc.* 903 F.2d 1064, 1066 (6th Cir. 1990). "A plaintiff may prevail on a retaliation claim even when the employer prevails on the original charge of discrimination that serves

as the basis of the alleged retaliation." *Wellman* at *1, citing *Jennings v. Tinley Park Community Consol. School District*, 796 F.2d 962 (7th Cir. 19886). However, he is still required to come forward with evidence of pretext to rebut the employer's articulation of the legitimate, non-discriminatory reasons already discussed. *Id.*

Defendant argues only that plaintiff fails to offer any evidence that he engaged in protected activity. In his brief, plaintiff responds in full.

> GE briefed Plaintiff's Retaliation and state law claims in one page. Inasmuch as this is a Motion for Summary Judgment for which Defendant GE has the burden of establishing that there are no genuine issues of material fact in dispute; that there is no evidence to support the non-moving party's case; and that the record taken as a whole could not lead a rational finder of fact to find for the non-moving party, GE has failed in their burden and these claims must go forward.

(pltf. brief at 34). However, in a summary judgment proceeding, the moving party need only shown an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 323. The party in opposition must when set forth specific facts showing that there is a genuine issue for trial and may not rest upon his pleadings. *Anderson*, 477 U.S. at 256. Therefore, defendant has satisfied its burden by pointing to the absence of evidence that plaintiff engaged in protected activity. Plaintiff's failure to set forth specific facts showing that he did so engage renders summary appropriate on this claim. *Celotex Corp.*, 477 U.S. at 323 (where the nonmoving party "has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," summary judgment is appropriate.)

(4) Counts 5-7 (defamation, intentional infliction of emotional distress

Defendant argues that plaintiff's defamation claims fail because he admitted at deposition that he did not know if Embrescia made the statements alleged and he admitted that he could produce no evidence that the security guard made the statements alleged. These claims fail for the reasoning set forth immediately above.

(5) Count 3 (Title VII)

The parties do not address this claim. However, it fails because Tittle VII only prohibits discrimination in employment on the basis of an individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. Plaintiff has only alleged discrimination based on his disability.

Conclusion

For the foregoing reasons, defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

s/Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Supreme Court U.S.
FILED
MAR 25 2002
OFFICE OF THE CLERK

No. 01-1074

IN THE

Supreme Court of the United States

GREGORY GILMORE,

Petitioner,

v.

GE REUTER-STOKES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

OSCAR TRIVERS
EDWIN KELLY*
TRIVERS & DICKERSON
925 Euclid Avenue
1025 Huntington Building
Cleveland, Ohio 44115
(216) 696-5444

Attorneys for Respondent

* *Counsel of Record*

173096

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

18pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Summary Judgment is appropriate under the facts of this case?

II. Whether Defendant's non-discriminatory reason for discharge of Plaintiff is a pretext?

III. Whether Plaintiff is required to request an accommodation? If so, was there such a request under the facts of this case?

IV. Whether Defendant retaliated against Plaintiff?

STATEMENT PURSUANT TO RULE 29.6

Respondent, GE Reuter-Stokes is a wholly-owned subsidiary of General Electric Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	3
REASON FOR DENYING THE WRIT	3
FIRST	3
SECOND	5
THIRD	9
FOURTH	10
CONCLUSION	11

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242; 106 S. Ct. 2505;
91 L. Ed. 2d 202 (1986) 3, 10

Burns v. City of Columbus, Dept. of Public Safety, Div. of Police,
91 F.3d 836 (6th Cir. 1996) 7

Celotex Corp. v. Catrett,
477 U.S. 317; 106 S. Ct. 2548;
91 L. Ed. 2d 265 (1986) 3, 10, 11

Copeland v. Machulis,
57 F.3d 4776 (6th Cir. 1995) 4

Cox v. Kentucky Dept. of Transportation,
53 F.3d 146 (6th Cir. 1995) 3, 4

Gant v. Wilson Sporting Goods Co.,
143 F3d 1042 (6th Cir. 1998) 9

Gray v. Champion Intern Corp.,
134 F.3d 371 (6th Cir. 1997) 8

Jasany v. United States Postal Service,
755 F.2d 1244 (6th Cir. 1985) 8

Cited Authorities

	Page
Keys v. Joseph Beth Booksellers, Inc., No. 97-6511, 1999 WL 97003 (6th Cir. 1999) ..	10
LaPoint v. U.A.W., Local 600, 8 F.3d 376 (6th Cir. 1993)	3
Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995)	8
Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996)	4, 7
McCrory v. Kraft Food Ingredients, 98 F.3d 1342 (6th Cir. 1996)	5
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 25 (1973)	4
School Bd. of Nassau County v. Arline, 480 U.S. 273; 107 S. Ct. 1123; 94 L. Ed. 2d 307 (1987)	8
Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999)	4
Teahan v. Metro-North Commuter R. Co., 951 F.2d 511 (2d Cir. 1991), *cert denied*, 506 U.S. 815 (1992)	8

Cited Authorities

Page

Tobbit & Castlement,
123 F.3d 899 (6th Cir. 1997) 9

Tolton v. American Biodyne, Inc.,
48 F.3d 937 (6th Cir. 1995) 4

United States v. Hodges X-ray, Inc.,
759 F.2d 557 (6th Cir. 1985) 3

Wellman v. Wheeling and Lake Erie Railway Co.,
134 F.3d 373 (6th Cir. 1998) 6, 7

STATUTES

Americans with Disabilities Act ["ADA"] 2, 6, 8, 9

Rehabilitation Act of 1973
29 U.S.C. § 794 7

42 U.S.C. §§ 12101 *et seq.* 4

RULE

Federal Civil Rule 56 3

STATEMENT OF THE CASE

Plaintiff Gregory Gilmore ("Gilmore") was employed as a Senior Engineer at GE Reuter-Stokes. ("Reuter-Stokes"). In August of 1995, he was assigned to the Environmental Products Team. In this position, which he held until his employment terminated in February of 1997, he reported directly to Karen Embrescia ("Embrescia"), Environmental Team Manager, and Chris Forland ("Forland"), CEMS Product Line Manager. (Forland transferred to another General Electric facility in November of 1996, and was replaced by Hesh Elghoroury ("Elghoroury"). At this point Gilmore reported indirectly to Elghoroury.

In April of 1996, Gilmore received his first written performance appraisal from Embrescia. Embrescia rated Gilmore's performance unsatisfactory and described his behavior as unacceptable, unbecoming as a professional and not consistent with company values. She wrote that his performance needed an immediate turnaround. Embrescia provided detailed feedback on areas in which he needed to improve including his interpersonal and communication skills. Gilmore was at that time placed on a Performance Improvement Plan ("PIP"). Embrescia's evaluation of Gilmore was based on her personal knowledge of his performance, as well as on input received from others including Forland and Glesius.

On February 11, 1997, Embrescia completed another written performance appraisal for Gilmore. Embrescia continued to rate his performance unsatisfactory, and noted his continued need to improve in the areas addressed in the April, 1996 evaluation. Embrescia again based her

assessment of Gilmore's performance on her personal knowledge as well as on input received from others including Forland, Glesius, and Elghoroury.

On February 19, 1997, P.J. Marolda ("Marolda"), President of Reuter-Stokes, received a memorandum from W.W. Phelan ("Phelan"), Vice-President of Marketing and Sales for Reuter-Stokes, which stated that ESSROC, a key Reuter-Stokes customer, had complained to him about Gilmore at a meeting between Phelan and ESSROC representative on February 18, 1997. ESSROC had strongly objected to the conduct, behavior and attitude of Gilmore and requested his removal as the field engineer representing Reuter-Stokes. Customer feedback which raised communication issues had been noted on Gilmore's April 1996 performance appraisal.

On February 22, 1997, Embrescia telephoned Gilmore and informed him that he was suspended with pay as a result of a serious customer complaint.

At this point in time, Marolda consulted with Embrescia, Glesius, Elghoroury, and Joseph Mooney ("Mooney"), Human Resources Manager, concerning this latest customer complaint, Gilmore's overall performance. Based on this review, Marolda decided to terminate Gilmore's employment. Embrescia and Mooney concurred with the decision.

Marolda and Embrescia notified Gilmore that he was terminated on February 25, 1997 for unsatisfactory performance and attitude.

Gilmore subsequently filed this action, alleging, inter alia, that he was discharged in violation of the Americans with Disabilities Act ("ADA").

The Defendant filed a Motion for Summary Judgment. The trial court (U.S. Dist. Ct. for the N.D. of Ohio, E.D.) granted Defendant's Motion for Summary Judgment. Plaintiff appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the trial court's decision. Thus, Plaintiff petitioned this Court for a Writ of Certiorari.

ARGUMENT

REASON FOR DENYING THE WRIT

The facts and law of the case do not present any special or compelling reasons that would invoke the United States Supreme Court's discretionary jurisdiction over Writs of Certiorari. Plenary review in this case are inappropriate for the following reasons:

First: Summary Judgment is appropriate when no genuine issue of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPoint v. U.A.W., Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material fact rests with the moving party. *Celotex*, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)) A fact is material only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e). The Court must afford all reasonable inference and construe the evidence in light most favorable to the nonmoving party. *Cox v. Kentucky Dept, of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *See also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985).

However, the nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by the jury." *Cox*, 53 F.3d at 150.

Summary Judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of the case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorful" and not "significantly probative", the Court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50.

> Under the ADA, in the absence of direct evidence of discrimination, a Plaintiff may seek to establish a prima facie case of discrimination. Once established, a prima facie case shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for its action. If the employer articulates such a reason, the Plaintiff must show that the reason given by the employer was pretextual in order to prevail.

Sullivan v. River Valley School District, 197 F.3d 804, 810 (6th Cir. 1999), citing §§ 42 U.S.C. 12101 *et seq.*; *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178, 1184-86 (6th Cir. 1996); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 25, 668 (1973).

Second: Respondent Employer, Reuter-Stokes offered a non-discriminatory reason for the discharge and Petitioner failed to show that such reason was a pretext. Even if Gilmore has established a prima facie case, summary judgment remains appropriate because Reuter-Stokes has set forth a nondiscriminatory reason for his discharge. Gilmore was discharged because of a serious customer complaint, unsatisfactory performance and attitude. These are clearly legitimate nondiscriminatory reasons which are sufficient to rebut a prima facie case of discrimination.

Defendant having articulated a non discriminatory reason for its actions, the burden then shifts back to plaintiff to demonstrate that the reasons given are a pretext for discrimination. To rebut the employer's stated non-discriminatory explanation for discharge, the plaintiff must show by a preponderance of the evidence that the proffered reasons (1) have no basis in fact, (2) did not actually motivate the discharge or (3) were insufficient to motivate the discharge. *McCrory v. Kraft Food Ingredients*, 98 F.3d 1342 (6th Cir. 1996).

It is undisputed that the reasons supporting Gilmore's discharge were based on objective observations. As noted, he does not deny that his conduct may have been perceived in the manner that it was described by Reuter-Stokes personnel. They are, therefore, based on fact. There is no evidence that the stated reasons did not actually motivate the discharge. In fact, Gilmore's contention seems to be that because of his disability, they *should* not have motivated the discharge. However, this is not a relevant question, so long as the reasons are *sufficient*. *Ibid.*

There can be no question that any conduct that tends to imperil an employer's relationship with a customer is a sufficient reason for discharge, particular when the employee had been given a specific warning concerning the quality of his communications with customers and the customer's complaint was directly related to communication issues. Significantly, Gilmore offers no facts to dispute that Reuter-Stokes received a serious customer complaint concerning him. Clearly, the related internal communications issues created by Gilmore, his attitudinal problems and their resulting impact on employee morale are sufficient reasons for discharge.

The case of *Wellman v. Wheeling and Lake Erie Railway Co.*, 134 F.3d 373 (6th Cir. 1998), is directly on point. The plaintiff alleged that he suffered from a type of major depression that rendered him disabled for the purposes of the ADA. The district court assumed arguendo that the plaintiff established a prima facie case and looked to the employer's asserted reason for termination. The court found that the business mistakes plaintiff had made in regard to dealings with a customer of the employer were a sufficient, non-discriminatory justification for the employer to fire him and affirmed the district court's grant of summary judgment. The court wrote:

> . . . . . Secondly, even if we assumed that *Wellman* did make out a prima facie case, the district court properly assessed the summary judgment evidence in finding that Wheeling had carried its burden as to the issue of a legitimate nondiscriminatory explanation and that Wellman had failed to respond with any evidence that the asserted reasons were a pretext for a

> discriminatory motive related to his disability. In the absence of any evidence of pretext for a discriminatory motive, the Catsburg Mining transaction and the numerous other incidents of poor decision-making and inefficient work habits provide legitimate non-discriminatory reasons for Wellman's termination and the district court properly granted summary judgment to Wheeling.

134 F.3d at 375.

It does not matter that the reasons were based on conduct which is related to the disability. *Burns v. City of Columbus, Dept. of Public Safety, Div. of Police*, 91 F.3d 836, 841-42 (6th Cir. 1996). In Burns, the court said:

> Unlike Title VII cases, where race or sex will almost never be an acceptable reason for an employment decision adverse to a qualified employee, the Rehabilitation Act permits an employer to make a decision because of a handicap if the handicap is not the sole reason for the decision. "The Rehabilitation Act forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap. A federal grantee may make an employment decision adverse to a handicapped person if, for example, the person's handicap causes him or her to be unable to perform an essential function of the job."

(Citations omitted.)[1]

---

1. The analysis of claims under the Americans with Disabilities Act parallels those brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1995). *Monette*, 90 F.3d at 1178.

See also Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995)

> [T]he district court correctly focused on the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability . . . [I]t strains logic to conclude that [unacceptable conduct] could be protected under the Rehabilitation Act or the ADA merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability.

Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17, 107 S. Ct. 1123, 1131 n.17, 94 L. Ed. 2d 307 (1987).

Gray v. Champion Intern. Corp., 134 F.3d 371 (6th Cir. 1997) is also instructive. In *Gray*, the district court held that the plaintiff was fired because of his conduct, not because of his disability. The plaintiff, citing the Second Circuit case of *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2d Cir. 1991), *cert denied*, 506 U.S. 815 (1992), argued that the district court erred in separating cause from manifestation in this way. He argued, much as Gilmore does, that the company fired him because of his conduct, which occurred because of his disability and, therefore, it fired him because of his disability. Expressly following *Maddox* and rejecting *Teahan*, the court held that the district court was correct in finding that the discharge had a sufficient independent basis. The court further pointed out that a claim that the plaintiff has been discharged because of disability based conduct is a failure to allege pretext and such a plaintiff cannot prevail on an ADA claim.

As stated in the lower court's decision:

> This Court is not permitted to decide whether termination for the concerns raised (i.e., arriving late, leaving early and failing to provide feedback) was fair. *Tobbit & Castlement*, 123 F.3d 899, 898 (6th Cir. 1997) ("An age discrimination action is not a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities.")

As the lower trial court further stated:

> Plaintiff has not created an issue of fact as to whether Defendant's reason for his termination was pretextual and Counts One (ADA) and Eight (Ohio Revised Code) fail. Count Eight also alleges wrongful discharge in violation of public policy, breach of implied contract and common law discrimination. This portion of the claim fails for the same reasons discussed above.

Third: Petitioner never requested an accommodation. He did not inform his employer that he needed an accommodation, due to his alleged disability. Plaintiff alleges that Defendant failed to accommodate him. However, the evidence Plaintiff points to cannot be construed as a request for accommodation.

The initial burden of requesting an accommodation is on the employee. *Gant v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998). For the purposes of a prima facie showing, a Plaintiff must merely suggest the

existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. *Keys v. Joseph Beth Booksellers, Inc.*, No. 97-6511, 1999 WL 97003 (6th Cir. 1999).

The trial court carefully evaluated the evidence and concluded that the Plaintiff, as a matter of law, had not shown that he was denied a reasonable accommodation and that the evidence did not show that he actually asked for specific accommodation.

Fourth: In order to show retaliation, Petitioner must show that he was engaged in protected activity. No such evidence is shown in this case.

In order to show retaliation in a Summary Judgment proceeding, the moving party need only show an absence of evidence to support the nonmoving party's case. *Celotex Corp.*, 477 U.S. at 323. The party in opposition must then set forth specific facts showing that there is a genuine issue for trial and may not rest on his pleadings. *Anderson*, 477 U.S. at 256. Therefore, Defendant has satisfied its burden by pointing to the absence of evidence that Plaintiff engaged in protected activity. Plaintiff's failure to set forth specific facts showing that he did so engage renders summary judgment appropriate in this claim. *Celotex Corp.*, 477 U.S. at 323.

CONCLUSION

This Court has held in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) that summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. The trial court and the Court of Appeals have both concluded that summary judgment is appropriate under the facts of this case. Plaintiff has failed to show that there is a conflict in the law as it applies to the specific facts of this case.

Plaintiff has failed to show that he requested accommodation and that he was engaged in protected activity. Likewise, Plaintiff has failed to show that the employer's nondiscriminatory reason for discharging him was a pretext.

Based upon the foregoing, the Respondent requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

OSCAR TRIVERS
EDWIN KELLY*
TRIVERS & DICKERSON
925 Euclid Avenue
1025 Huntington Building
Cleveland, Ohio 44115
(216) 696-5444

Attorneys for Respondent

* *Counsel of Record*